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Nos. 97-236 and 97-5469

In the Supreme Court of the United States

OCTOBER TERM, 1997

ANTHONY J. TUSA, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

SEBASTIAN SALVATORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether video poker licenses issued by the State of Louisiana constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341.

2. Whether the court of appeals properly reviewed under the abuse of discretion standard the trial court's determination to empanel an anonymous jury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a)[1] is reported at 110 F.3d 1131.

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[1] "Pet. App." refers to the appendix to the petition in No. 97-236.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1997. A petition for rehearing was denied on May 27, 1997 (Pet. App. 33a-34a). The petition for a writ of certiorari in No. 97-236 was filed on August 7, 1997, and the petition for a writ of certiorari in No. 97-5469 was filed on August 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners Anthony and Victor Tusa were convicted on two counts of mail fraud, and petitioner Salvatore was convicted on seven counts of mail fraud, in violation of 18 U.S.C. 1341.[2] In addition, petitioner Salvatore was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962); one count of conspiring to commit that offense (18 U.S.C. 1962); two counts of conducting an illegal gambling business (18 U.S.C. 1955); 16 counts of wire fraud (18 U.S.C. 1343); and one count of interstate travel in aid of racketeering activity (18 U.S.C. 1952). The Tusas each were sentenced to ten months' imprisonment, an $11,838 fine, and $37,048 in restitution. Salvatore was sentenced to 18 months' imprisonment and $25,000 in restitution. The court of appeals affirmed. Pet. App. 1a-31a.

1. The evidence at trial showed that petitioners were part of a scheme through which several Mafia

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[2] The Tusas were acquitted of conducting an illegal gambling business (18 U.S.C. 1955). Before trial, 15 co-defendants pleaded guilty to various charges.

crime families intended to control the video poker gambling industry in Louisiana.

In 1991, Louisiana enacted the Video Draw Poker Devices Control Law, see La. Rev. Stat. Ann. §§ 27:301-27:324 (West Supp. 1997), which legalized video poker machines. To operate in the State, video poker machine manufacturers, distributors, and owners had to be licensed. The licensing criteria provided that a license applicant had to be a person of good character who had not been convicted of certain criminal offenses. Pet. App. 2a. The Video Gaming Division of the Louisiana State Police was charged with oversight of the video poker industry. *Ibid.*

Co-defendants Christopher Tanfield and Steven Bolson operated Worldwide Gaming of Louisiana, Inc. (Worldwide Gaming), and Louisiana Route Operators, Inc. (LRO). Worldwide Gaming had licenses to sell and distribute video poker machines. LRO was licensed as a route operator company, which gave it the power to own video poker machines, place them in businesses, and receive revenue from the operation of the machines. Pet. App. 3a-4a. Tanfield and Bolson obtained licenses for those companies by concealing the fact that the companies and they, in reality, were "fronts" for organized crime, including the New Orleans-based Marcello crime family and the New York-based Gambino crime family. Petitioner Salvatore was a member of the Marcello organized crime family. *Id.* at 4a.

Tanfield and Bolson operated under the direction of organized crime as wholesalers in the video poker industry. They bought video poker machines from Bally Gaming, sold the machines to various businesses in Louisiana, and participated in the routes of those businesses. Tanfield and Bolson then funneled

the money that Worldwide Gaming and LRO received to the Marcello and Gambino organized crime families. Petitioners Victor and Anthony Tusa owned and operated Bayou Casino, Inc., a video poker route operator. Pet. App. 4a.

In their application for a license for Bayou Casino, the Tusas did not state that the company had any relationship with any co-defendant, including petitioner Salvatore, or with any other organized crime figures. Gov't C.A. Br. 9-10. The Tusas' license application instead stated that they alone were the persons who had substantial direct or indirect controlling interest in the company. *Id.* at 10. The State Police relied on those statements in issuing a license to the Tusas. *Ibid.* In fact, however, the Tusas' company was controlled by Marcello organized crime family members.

On July 9, 1992, Anthony Tusa spoke to Marcello family member Joseph Gagliano. Tusa expressed concern about dealing with Bolson and Tanfield; he said he would prefer to deal with Marcello family head Anthony Carollo or with family members Gagliano, Frank Gagliano, Sr., Joe Marcello, and Salvatore. Gov't C.A. Br. 14.[3] On July 13, 1992, Anthony Tusa told Gagliano that he thought he would have a "sit down" meeting with the mob members to discuss his and his brother's business with the mob. *Ibid.* In September 1992, Carollo, the Gaglianos, and Marcello discussed their involvement in the video poker business, including their relationship with Anthony Tusa. *Id.* at 15-16. On December 2, 1992, Carollo, Marcello, Salvatore, and others met to discuss

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[3] Recordings of those intercepted conversations were played for the jury. Gov't C.A. Br. 14.

putting the various companies under the umbrella of co-defendant Felix Riggio's companies. *Id.* at 17.

On December 17, 1992, Victor Tusa met with Carollo, the Gaglianos, and Riggio. Tusa discussed a potential service contract from Bolson; the others told Tusa not to sign that contract. According to an expert witness, that conversation showed that Tusa wanted to get approval first from the true owners of the company, the Marcello crime family. Gov't C.A. Br. 17-18.

The Tusas met again with the mob members on January 7, 1993. At that meeting, the Tusas were told that they were to provide the Marcello crime family with 25% of Bayou Casino's profits. Victor Tusa said he had no problem dealing with the Marcello family members; he simply expressed his desire that the dealings be "fair." Gov't C.A. Br. 19.

2. Before trial, the government moved for an anonymous jury; most of the defendants opposed that motion. The government also provided the district court, ex parte, with evidence showing the need for an anonymous jury.[4] The prosecutors initially based their request on the likelihood that co-defendant Joseph Corozzo had "fixed" a jury in a then-recent New York state prosecution and on co-defendant Riggio's death threats to witnesses in a previous

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[4] When the case reached the court of appeals, the government moved to unseal the information it had provided to the district court, and the court of appeals approved that unsealing. As a result, petitioners had full access to the basis on which the district court had made its ruling.

federal trial. C.A. R.E. Addendum 1; see Pet. App. 23a-24a.[5]

Almost two months later, after most of petitioners' co-defendants had pleaded guilty, the trial court asked in camera if the government still requested an anonymous jury. The prosecutors responded that they still sought such relief, because Salvatore was a high-ranking member of the Marcello crime family, and co-defendant Kenneth Jowaiszas was "the accountant to the mob" in New Orleans and New York. C.A. R.E. Addendum 2, at 2, 4-5. Because of those associations, the prosecutors contended, other members of the Mafia would seek to influence the jury so that Salvatore and Jowaiszas would not be convicted and not feel compelled to cooperate with the government in order to avoid lengthy sentences. *Id.* at 8-9. While one of the prosecutors conceded that the need for an anonymous jury might be less compelling if Jowaiszas pleaded guilty, another prosecutor pointed out that the presence of any Mafia-related defendant presented issues of juror safety. *Id.* at 12-13, 19-20. The court decided to proceed with an anonymous jury. *Id.* at 20.

During voir dire examination, the court informed the prospective jurors that their names, addresses, and places of employment for themselves and their spouses would not be revealed to the government or the defendants. C.A. R.E. Addendum 3, at 6. The court told the venire that the purpose of an anonymous jury was to ensure that both sides received a

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[5] "C.A. R.E. Addendum" refers to the record excerpts that the government filed under seal in the court of appeals, and that that court later ordered to be unsealed.

fair trial and was not a reflection on the defendants or anyone associated with them. *Id.* at 7-8.

3. The court of appeals rejected petitioners' various challenges to their convictions. With respect to petitioners' challenge to the anonymous jury, the court of appeals concluded that use of such a jury was justified because of petitioners' close connection to organized crime, including persons who had "the capacity and willingness to interfere with the judicial process" by tampering with juries. Pet. App. 24a. The court also noted that petitioners faced potentially long sentences, and that there was much publicity surrounding the case, "thus enhancing the possibility that the jurors' names would have become public." *Ibid.* The court also pointed out that petitioners' ability to conduct an effective voir dire of the jury was not impaired, and that the trial judge had given a "plausible and nonprejudicial" explanation to the jurors for why their names would not be made public, so that petitioners' presumption of innocence was not impaired. *Id.* at 25a-26a.

The court below likewise rejected the Tusas' challenge to their mail fraud convictions. In a lengthy discussion, the court of appeals held that the video poker licenses constituted "money or property" within the meaning of the mail fraud statute, 18 U.S.C. 1341. Pet. App. 10a-22a. Relying on *McNally* v. *United States*, 483 U.S. 350 (1987), and *Carpenter* v. *United States*, 484 U.S. 19 (1987), the court reasoned that, "in considering whether video poker licenses constitute property under the mail fraud statute, we must determine whether Louisiana has an interest in the licenses as a property holder." Pet. App. 12a. The court held that Louisiana had more than just a regulatory interest in the video poker licenses, there-

by justifying application of the mail fraud statute. *Id.* at 13a.

The court below first reasoned that the concept of property involves a legal "bundle of rights," including the rights to "possess, use, and dispose" of a particular article. Pet. App. 14a. As applied here, the court found that that "bundle" includes the right to control issuance of a license. The court also concluded that Louisiana had "zealously sought to protect its right to control [video poker] licenses." *Id.* at 15a. The court went on to reject a distinction between issued and unissued licenses, and it found that unissued video poker licenses had value to the State. *Id.* at 16a-17a. The court of appeals further determined that the State had a property, and not merely a regulatory, interest in the video poker licenses, because the State had "a direct and significant [continuing] financial stake * * * as issuer of the licenses" in the video poker industry. *Id.* at 19a.

Finally, the court of appeals concluded that the Louisiana statutory scheme evinces the legislature's intent for the State to maintain its control and ownership of video poker licenses by expressly stating a limitation on the property interests of licensees. Pet. App. 20a-21a (discussing La. Rev. Stat. Ann. § 27:301(D) (West Supp. 1997)). Similarly, after applying traditional property law concepts, the court below found that the licenses constituted property. *Id.* at 21a-22a.[6]

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[6] The court of appeals also rejected petitioners' other challenges to their convictions, including that there was insufficient evidence to sustain their convictions, that the Tusas should have received a separate trial, that the indictment was constructively amended, and that co-conspirator statements

ARGUMENT

1. Petitioners contend (97-236 Pet. 11-19) that the video poker licenses at issue in this case do not constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341 Contrary to petitioners' claim, the court of appeals correctly rejected that contention and it does not warrant further review.

a. In *Carpenter* v. *United States*, 484 U.S. 19 (1987), the Court affirmed the wire fraud conviction of a *Wall Street Journal* columnist who had traded stock before publication of his newspaper column based on his knowledge of what that column would say. The Court made clear that the intangible nature of the misappropriated confidential information did not make the information any less a form of "property" within the meaning of the mail fraud statute. *Id.* at 25-27. The Court explained that the *Journal* had been deprived of its property right to the exclusive use of its confidential information, even though the defendants had not totally deprived the *Journal* of its possession of the information or its ability to publish it. *Id.* at 26-27.

Here, the court of appeals correctly concluded that the State of Louisiana had a property interest in the unissued video poker licenses similar to the *Wall Street Journal*'s interest in maintaining the confidentiality of its business information. In *Carpenter*, the Court held that the *Journal*'s exclusive right to control its confidential information was a property interest. 484 U.S. at 26. By the same token, in this case, "what the [State] (and derivatively its

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were wrongly admitted at trial. Pet. App. 5a-10a, 26a-31a. Petitioners do not renew those claims here.

people) lost was the right to keep its [video poker] licenses to itself and to bestow them on persons who had fairly earned them." *United States* v. *Martinez*, 905 F.2d 709, 714 (3d Cir.), cert. denied, 498 U.S. 1017 (1990). The State also lost the right to substantial, continuing earnings under the license. The court of appeals thus correctly found that the licenses had continuing value to the State.[7]

b. Petitioners contend (Pet. 11-15) that the decision in this case conflicts with holdings of other courts of appeals that particular licenses, especially unissued licenses, did not constitute property under the mail fraud statute. Although the court criticized reasoning in some of those cases that an unissued license cannot be "property" even though an issued license can be, see Pet. App. 15a-17a, it ultimately explained that "video licenses are different from other types of licenses," *id.* at 19a n.2, because of the "character of the licenses themselves," *id.* at 18a. Because of those distinct characteristics of

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[7] There is no merit to petitioners' suggestion (Pet. 18) that the decision in this case is inconsistent with *McNally* v. *United States*, 483 U.S. 350 (1987). In that case, this Court held that there was no "property" taken within the meaning of 18 U.S.C. 1341 by a scheme to defraud citizens of their "intangible right" to honest government. The Court ruled that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." 483 U.S. at 356. Because the indictment in *McNally* made no allegation that the fraud being charged related to "property," there was no occasion for the Court to address whether a license like the kind at issue in this case is "property" within the meaning of Section 1341. And as the Court made clear in *Carpenter*, "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." 484 U.S. at 25.

Louisiana's video poker license, the holding here is distinguishable from court of appeals decisions that have reversed mail fraud convictions on the ground that various types of licenses were not "property." See, *e.g.*, *United States* v. *Schwartz*, 924 F.2d 410, 417-418 (2d Cir. 1991) (arms export license); *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator's permit), cert. denied, 500 U.S. 921 (1991); *United States* v. *Kato*, 878 F.2d 267, 268-269 (9th Cir. 1989) (private pilot's license); *Toulabi* v. *United States*, 875 F.2d 122, 125 (7th Cir. 1989) (taxi driver's license); *United States* v. *Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling license); *United States* v. *Murphy*, 836 F.2d 248, 254 (6th Cir.) (bingo license), cert. denied, 488 U.S. 924 (1988).

As the court of appeals explained, those cases rest on the theory that, in the manner in which particular licenses operated in the states that had issued them, those licenses did not represent property to the issuing governments. Rather, under the reasoning of those cases, "the issuance of a license is nothing more than a physical manifestation of the government's intent to regulate." Pet. App. 17a. The court of appeals in this case "agree[d], as an initial matter, that the right to regulate a particular industry does not *a fortiori* give the regulator a property interest in licenses signifying the government's regulation." *Id.* at 18a. Here, however, the State "has a direct and significant financial stake in its role as issuer of the licenses" because it received an "up-front fee" for the license and a significant percentage of net revenues as a franchise fee. *Id.* at 19a. The court noted that the State fully expected to receive continuing funds from the video poker license (22.5% of the licensee's net revenues), such that the license "evinces the

State's intent to participate in that industry." *Id.* at 18a. That entitlement to future revenue gave the State a continuing property interest in the license and therefore justifies a conclusion that the licenses, in the words of *McNally*, represent "[g]overnment's interests as property holder" (483 U.S. at 359 n.8).

The cases on which petitioners rely involve licenses that lack that revenue-producing feature. See *Murphy*, 836 F.2d at 250-254 (no indication of continuing financial stake by government in the bingo license); *Granberry*, 908 F.2d at 280 (same for bus license); *Dadanian*, 856 F.2d at 1392 (same for poker club license); *Kato*, 878 F.2d at 269 (same for pilot's license); *Schwartz*, 924 F.2d at 417-418 (same for arms export license); *United States* v. *Novod*, 923 F.2d 970, 975 (2d Cir.) (same for waste dumping permit), cert. denied, 500 U.S. 919 (1991); *United States* v. *Paccione*, 949 F.2d 1183, 1186-1187 (2d Cir. 1991) (same for medical waste dumping permit), cert. denied, 505 U.S. 1220 (1992); *Toulabi*, 875 F.2d at 126 (same for taxi driver license). Accordingly, none of those cases conflicts with the holding that the video poker licenses represented a property right protected under the mail fraud statute.[8]

2. Petitioners also argue (97-5469 Pet. 9-16; 97-236 Pet. 19) that it was improper to empanel an anony-

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[8] To the extent that the cited decisions rest on a view that the mail fraud prosecutions were deficient because they rested on the intangible rights theory rejected by *McNally*, those decisions have no continuing importance in light of 18 U.S.C. 1346's provision, enacted after *McNally*, that a "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." All of the decisions on which petitioners rely arose from schemes that were executed before Section 1346 was enacted.

mous jury for their trial, and that the court of appeals employed the wrong standard of review—abuse of discretion—in upholding the trial court's determination. That claim is without merit.

The courts have recognized that a decision to withhold the names and addresses of members of the jury venire "require[s] a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings." *United States* v. *Childress*, 58 F.3d 693, 702 (D.C. Cir. 1995), cert. denied, 516 U.S. 1098 (1996). Accordingly, "[w]ith so many factors entering the calculus, each varying subtly, an appellate court's de novo resolution of the issue would merely duplicate the trial judge's efforts." *Ibid.* Hence, the proper scope of review is for abuse of discretion. *Id.* at 702-703. Accord *United States* v. *DiDomenico*, 78 F.3d 294, 301-302 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996); *United States* v. *Darden*, 70 F.3d 1507, 1532 (8th Cir. 1995), cert. denied, 116 S. Ct. 1449 (1996); *United States* v. *Ross*, 33 F.3d 1507, 1519 (11th Cir. 1994), cert. denied, 515 U.S. 1132 (1995); *United States* v. *Thornton*, 1 F.3d 149, 154 (3d Cir.), cert. denied, 510 U.S. 982 (1993).[9]

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[9] In *Darden*, the court further noted the prudence of following certain "guidelines," which generally provide that "a court should not empanel an anonymous jury without 'a) concluding that there is strong reason to believe the jury needs protection, and b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected.'" 70 F.3d at 1532 (quoting *Paccione*, 949 F.2d at 1191-1193. The *Darden* court noted that, in adopting those "guidelines," it was following the Second Circuit (which had suggested them in *Paccione*) and the D.C. and Eleventh Circuits. *Ibid.* (citing *United States* v. *Edmond*,

Petitioners rely primarily upon *United States* v. *Vario*, 943 F.2d 236 (2d Cir. 1991), cert. denied, 502 U.S. 1036 (1992), for their claim that the court of appeals should have employed a more exacting standard of review of the trial court's determination. In that case, however, the court of appeals affirmed a trial court's decision to empanel an anonymous jury under what appears to have been an abuse of discretion standard. The court of appeals pointed out that the trial court was justified in relying on the fact that Vario's co-conspirator was charged with grand jury tampering and that it was expected that there would be publicity surrounding the case. *Id.* at 240.

More recently, the Second Circuit has made clear that so long as there is evidence to support the district court's finding that there is reason to believe the jury needs protection, and the district court takes reasonable precautions to minimize the prejudicial effects on a defendant, "the trial court is accorded broad discretion to determine whether to empanel an anonymous jury." *United States* v. *Wong*, 40 F.3d 1347, 1376 (1994), cert. denied, 516 U.S. 870 (1995); *United States* v. *Thai*, 29 F.3d 785, 801, cert. denied, 513 U.S. 977 (1994). The district court determined here that there was reason to believe that the anonymity of the jury required protection, partly because of anticipated publicity and partly because of Salvatore's connection to organized crime. Pet. App. 23a-24a. The trial court also took steps to ensure that petitioners' rights would be protected; it told the jury that it was not revealing their names and addresses to protect the fair trial rights of both the government

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52 F.3d 1080, 1090-1091 (D.C. Cir.), cert. denied, 516 U.S. 998 (1995); *Ross*, 33 F.3d at 1519-1521.

and the defendants and that such a step was not a reflection on either party. *Id.* at 25a. Accordingly, because petitioners' rights were adequately protected and the decision below accords with the views of every other circuit that has addressed the issue, further review is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1997

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[*] Acting Solicitor General Seth P. Waxman is recused in this case.